

APPEAL NO. 022449
FILED NOVEMBER 15, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 28, 2002. The hearing officer determined that the compensable injury sustained by the appellant (claimant) on _____, does not extend to or include a right rotator cuff tear, and that the disability issue was not ripe for resolution. The claimant appeals these determinations and contends that the hearing officer erred in excluding one of her exhibits. The respondent (carrier) urges affirmance of the hearing officer's decision and argues that the exhibit in question was properly excluded.

DECISION

Affirmed in part, reversed and remanded in part.

Regarding the exclusion of Claimant's Exhibit No. 16 for lack of timely exchange, we have frequently held that to obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer noted that the exhibit, a doctor's letter dated August 20, 2002, was received by the claimant and exchanged with the carrier the day prior to the hearing. There was no indication that the letter could not have been obtained at an earlier date. For this reason, the hearing officer excluded the exhibit and we find no abuse of discretion.

Conflicting evidence was presented regarding whether the injury extended to a right rotator cuff tear. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's findings of fact in this regard are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175 (Tex. 1986).

Regarding disability, we must remand this issue to the hearing officer. This issue is ripe for determination because the claimant has a compensable injury and has not been working. The claimant claims that he is entitled to temporary income benefits, and whether and why the claimant was unable, because of a compensable injury, to obtain and retain employment was an issue at the hearing. On remand, the hearing officer must decide the threshold issue of whether the injury extended to include the spinal condition for which the claimant underwent surgery outside the spinal surgery process of Tex. W.C. Comm's, 28 TEX. ADMIN. CODE § 133.206 (Rule 133.206). A claimant

may have disability resulting from medical treatment, even when that treatment is not properly preauthorized. See Texas Workers' Compensation Commission Appeal No. 961840, decided November 4, 1996; see also Texas Workers' Compensation Commission Appeal No. 992458, decided December 22, 1999. However, the treatment must be for the compensable injury. In this case, the carrier accepted a strain injury to the low back and it was not fully developed whether the lumbar spinal surgery was for a condition related to the compensable injury. We remand for the hearing officer to consider the threshold extent issue and to reconsider the disability issue consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **ROYAL INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge